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April 9, 2013

By Email (council@bainbridgewa.gov) Only

City Council Members
City of Bainbridge Island
280 Madison Avenue North
Bainbridge Island, WA 98110

Re: Comment Letter: Draft SMP

Dear Council Members:

My firm represents various waterfront property owners with land on Port Madison, Blakely Harbor, Manzanita Bay, Agate Passage, Wing Point, Eagle Harbor, and Point Monroe. This letter provides comment on the Draft Shoreline Master Program ("SMP") submitted to the City Council by the Planning Commission. This letter supplements the comments of many citizens including one submitted by Ms. Kim McCormick. See Ms. McCormick's letter of January 31, 2013 provided to the Bainbridge Shoreline Homeowners (**Exhibit 1** hereto). It complements the submittal by Linda J. Young entitled "Misconceptions and Personal Taste Rule Bainbridge SMP, Not Law or Science."

The citizens who asked my firm to submit comments on their behalf appreciate the hard work of Staff, the Planning Commission and the City Council to achieve a workable SMP. However, they have significant concerns with the current Draft. Detailed suggestions are set out herein which they believe will improve the current Draft. These are offered as constructive comments. Most importantly, process concerns are set out which the City should implement to avoid procedural flaws that could result in a Declaration of Invalidity or Finding of Non-Compliance by the Growth Management Hearing Board if the new SMP is appealed.

My clients request that the City Manager, Interim City Attorney and key staff meet with me and Ms. McCormick to vet concerns and streamline joint recommendations to the full Council for its consideration prior to the April 24, 2013 meeting.

The citizens represented by my firm view the Shoreline Management Act ("SMA") as a partnership between government and property owners to collaboratively promote the reasonable use and development of shorelines with attendant protection of the aquatic environment and shorelands. They believe that a workable SMP can be adopted which (1) adequately protects the environment; (2) is consistent with local circumstances;¹ (3) continues to recognize accepted and traditional uses of the shorelines; (4) is consistent with SMA policies and the State Guidelines; (5) respects constitutionally protected private property rights; and (6) creates a basis for support of community sponsored voluntary shoreline restoration projects.

¹ The State Guidelines provide substantial discretion to governments to consider local circumstances. WAC 173-26-090; WAC 173-26-178(3)(1).

In my clients' opinion, the importance of the shorelines to all, and their use by private owners and citizens, justifies a detailed look at the Draft.

Recommendations

It is urged that **prior** to adopting the Draft SMP for submittal to the State of Washington Department of Ecology, the Council **accept and implement** the following recommendations.

- (1) The public remains confused about much of the language in the Draft SMP. In the public hearing format, the Council is not able to answer citizen questions in an adequate fashion. The property owners I represent **recommend** that the Council convene a workshop where the public's questions can be asked and answered before acting further on the SMP proposal.
- (2) It is not helpful for some Council members to advise citizens that they are "misinformed" or "do not understand" the SMP proposal. With due respect, the City has an affirmative obligation to explain itself to the public, in particular, the goals and objectives it envisions for sections of the Draft SMP imposing new buffers, setbacks, vegetation protection, and the legal or factual basis to apply the restrictive Shoreline Conservancy Environmental designation to substantial portions of the Island. My clients **recommend** that the City solicit questions from the public and then prepare a detailed Questions and Answers document to be posted for public review and comment.
- (3) My clients **recommend** that the City obtain an outside consultant to provide a critical review of the City's science which includes much information from state agencies. This step is consistent with a "second look" at information generated by the State of Washington Departments of Ecology and Fish and Wildlife which the Legislature is promoting.² Jon Houghton, PenTech, would be a good choice. His firm has prepared site specific studies of docks on the Island. *See* p.42, *infra*. As set out herein, the science regarding the impacts of residential development and use upon the marine environment does not document measurable net loss if modern regulatory regimes and project-specific mitigation is utilized.
- (4) My clients **recommend** that the City specify in writing the changed local circumstances, new information and improved data Staff is relying upon for the Draft SMP proposal. Then additional public comment should be allowed on the analysis before proceeding to further deliberation on the proposed SMP.
- (5) My clients **recommend** the City insist that Staff prepare a compliant Cumulative Impacts Analysis ("CIA") which adequately assesses the effectiveness of the existing regulatory

² *See* House Bill 1112, concerning standards for the use of science to support public policy which passed 97-0 in the House on March 6, 2013.

regime, then allow public comment on the revised CIA before proceeding to deliberate on the proposed SMP.

- (6) My clients **recommend** that the City continue to reject the premise that all shorelines are "critical areas," and thus, do not adopt any new buffers or generic set asides.
- (7) My clients **recommend** that the City assess regulation of critical areas solely under SMA standards which allow alteration of the natural condition of the shorelines for priority uses subject to appropriate project mitigation.
- (8) My clients **recommend** that the City mandate establishment of new marine buffers (if any) on a case-by-case basis for new commercial and industrial development, and perhaps large subdivisions, through the existing SEPA and SMA permit processes. The Council should not impose any new buffers, setbacks or vegetation protection areas beyond the existing Native Vegetation Zone.
- (9) My clients **recommend** that the City prepare a regulatory taking analysis, then allow additional public comment on the analysis before proceeding to deliberate on the proposed SMP.

Process

There are process issues which citizens believe require the immediate attention of the City Council.

First, the City is required to "periodically review" its existing Shoreline Master Program. Such review, however, does not equate to creating an entirely new SMP (in this case a document over 400 pages if the appendices are included).

Changes to the existing SMP are not required unless "... deemed necessary to reflect changing local circumstances, new information or improved data." *See* WAC 173-26-090. The record does not support the wholesale adoption of a new SMP under the guise of periodic review. At a minimum, Staff **should be required** to identify each changed local circumstance, new information or improved data ostensibly justifying each proposed change to the current SMP before closing public comment.

There currently is no analysis in the record which provides required justification for the proposed changes. Thus, meaningful public comment is precluded.

Second, upon inquiry, Staff advises that there is no map which explicitly specifies the "critical areas" located within shoreline jurisdiction to be regulated under the new SMP. The Guidelines require this. *See* WAC 173-26-201(2)(c)(ii). **Without a precise understanding as**

to the extent and location of shoreline regulated critical areas, meaningful public comment is precluded.

Based on the Draft SMP language, it appears the entire nearshore of Bainbridge Island may be considered a Fish and Wildlife conservation "critical area," or, if not, the nearshore is an area that requires special protection via use of new restrictive buffers. See CIA, Table 6-2, "SMP Standard Buffers," p.61. If so, this is a severe over-designation. See discussion, *infra*, at pp.10-13.

Third, there is no "cause and effect" analysis justifying any new regulations. Dr. Donald F. Flora³ has reviewed the Bainbridge Island Nearshore study with the intent to correlate the "cause-and-effects" scientific link between the ecological stressors and the degree of development impacts. Dr. Flora's analysis is attached hereto as **Exhibit 3**. See also **Exhibit 4** through **Exhibit 7**, Dr. Flora follow-up analysis on absence of documented cause and effect.

As the Council can see, Dr. Flora found that there is no direct cause-and-effect correlation between identified and perceived development impacts.⁴ Thus, the science does not support the recommended regulations. Undocumented presumptions or narrow agency perspective to "regulate at all cost" is not a legally sufficient basis to preclude common shoreline development, e.g., bulkheads. See *infra*, p.16-17, case law prohibiting adoption of new regulations based only upon "speculation and surmise."

³ Dr. Flora's resume is attached hereto as **Exhibit 2**.

⁴ Courts routinely exercise their "gate-keeper" authority to exclude the admission of "junk science" under the authority of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588 (1993) and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Expert witness opinions must be soundly based in scientific methodology, generally accepted and reliable, based on the specific facts at hand. See *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606-07, 260 P.3d 857 (2011) (noting that "[e]videntiary rules provide significant protection against unreliable, untested, or junk science") (citing 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW & PRACTICE § 702.19, at 88 (5th ed. 2007).

The Washington State Constitution accords citizens of this state a heightened protection of private property rights, See Wash. Const. Article 1, sec. 16. The right to use and enjoy land for any legitimate purpose is a well-recognized, fundamental property right in Washington. See e.g., *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 120, 49S. Ct. 50, 73 L. Ed. 210 (1928); *Manufactured Housing Cmty. v. State*, 142 Wn.2d 347, 364, 13 P.3d 183 (2000); *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960) In order to avoid being invalidated as arbitrary and capricious, restrictions on development must be reasonably necessary based on specific, identifiable facts, rather than generalized impacts or needs. See *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 760-61, 49 P.2d 867 (2002); see also *Environmental Coalition of Ojai v. Brown*, 72 F.3d 1411 (9th Cir. 1995) (ruling "if it appears from the record that the Government based its decision on a 'reasoned evaluation' of the relevant factors thoroughly evaluated recent scientific developments [and] Having done so, and having determined based on careful scientific analysis that its initial conclusion remained valid," a decision is not arbitrary and capricious). Thus, to avoid "as applied" challenges to future permit decisions, the City Council should consider the reliability of the "science" proffered to support the Draft SMP to determine if it meets the *Daubert* and ER 702 admissibility standards. If not, it may not legally be used to support the proposed development restrictions.

According to studies, one-third of Puget Sound is armored. In the City's conservancy environments, 24% of the total shorelines are armored. For the remaining environments, between 40% and 70% of the parcels are armored. *See* CIA, p.68.

If the hypothesis is true that armoring has significant adverse impacts on beaches and the aquatic environment, these effects or impacts would be recognized and well documented; but they are not. The absence of documented impacts shows that the assumptions of dire consequences associated with properly sited and designed residential bulkheads are off-base.

While "new studies" have been mentioned, the studies available do not address structures built at or above the ordinary high water mark, as required by existing City and state regulations. Historic bulkhead structures significantly intruded seaward below OHWM and have documented impacts. But locating bulkhead at or above the ordinary high water mark ("OHWM") does not result in such impacts. *See* Comments, *infra*, pp.34-35

Fourth, the State Guidelines mandate preparation of a CIA. **A compliant CIA must be prepared before a new SMP can be adopted.** The CIA must consider and assess the benefits provided by existing regulations and project mitigation imposed under Shoreline Management Act ("SMA") permitting and State Environmental Policy Act (SEPA) authority:

Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions and other shoreline functions fostered by the policy goals of the act . . . Evaluation of such cumulative impacts should consider: . . . (iii) **Beneficial effects** of any established regulatory programs under the other local, state, and federal laws.

WAC 173-26-186(8)(d) (emphasis supplied).

The City's CIA dated March 2012 mentions some state and federal regulations in a generic fashion. *See* CIA, pp. 54-58. There is absolutely **no analysis** as to the "beneficial" effects of these regulations. Under Table 6.1, "Potential Impacts," impacts to shoreline ecological functions associated with upland development are mentioned, but only "SMP countermeasures" are set out in terms of mitigating potential impacts. *See* CIA, pp.60-61.

There is no mention or analysis of the beneficial effects of state or federal regulatory systems. This is also the case for the summary of potential impacts associated with overwater structures in shoreline jurisdiction and SMP countermeasures. *See* CIA, Table 6.3, p.64. There is only minor mention of "mitigation measures" for overwater structures "encouraged" by WDFW. *See* CIA, p.65. In fact, WDFW's mitigation measures are not "encouraged" but mandated as are the Army Corps of Engineers design standards for private docks. Addressing shoreline stabilization, the same comments apply. *See* CIA, Table 6.4, p.67.

Existing regulatory systems include: Growth Management Act large lot zoning; State Environmental Policy Act policies and substantive authority; storm water management regulations; updated health regulations; the State Hydraulic Code for overwater development; and many other laws such as Section 404 Clean Water Act or Section 10 Rivers and Harbors Act provisions for docks or bulkheads.

The record before the City Council does not meet required standards to meaningfully discuss the efficacy of these regulatory regimes before considering new regulations. Without such analysis, the City (1) impermissibly restricts developments and uses allowed by other agencies with jurisdiction, and (2) overstates potential cumulative impacts. The result is overregulation in the Draft SMP because important regulatory controls are ignored.

Fifth, the State Guidelines require that a "mechanism" be in place in the SMP for documenting all project review actions in shoreline areas. Local governments are required to identify a process for "periodically evaluating" cumulative facts, which includes monitoring of impacts of approved projects. *See* WAC 173-26-191(2)(a)(ii)(B).

There is not an explicit mechanism set out in the Draft SMP. This is a critical oversight, as it denies the public and the City an opportunity to monitor impacts and revise regulations if necessary based upon actual experience. It also takes away the ability to use adaptive management principles. As the State Guidelines state:

Effective shoreline management requires the evaluation of changing conditions and the modification of policies and regulations to address identified trends and new information. Local governments should monitor actions taken to implement the master program and shoreline condition to facilitate appropriate updates to master program provisions to improve shoreline management over time."

WAC 173-26-201(2)(b).

Sixth, there is no showing of coordination with the Washington State Department of Natural Resources as required by the State Guidelines. *See* WAC 173-26-201(3)(d)(i)(E)(ii).

The SMA is Sensitive to Protection of Private Property Rights.

The comments under this heading focus on the SMA and its deference to private property rights.

The right to own and use one's private property is protected by the state and federal constitutions. *See* U.S. Const. Amend. V; Wash. Const. art. I, § 16; *Mfr'd. Housing Cmty. of*

Wash. v. State, 142 Wn.2d 347, 368 (2000) (Property rights consist of the fundamental rights of possession, use and disposition).

Property rights are not “poor relations” of other Bill of Rights guarantees. *See Dolan v. Tigard*, 512 U.S. 374, 392 (1994).

The Shoreline Management Act (SMA) unequivocally states that coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state **while, at the same time, recognizing and protecting private property rights** consistent with the public interest. RCW 90.58.020 (emphasis supplied). The SMA also states that “the Legislature further finds that much of the shorelines of the state and the uplands adjacent thereto **are in private ownership**” RCW 90.58.020 (emphasis supplied).

Nothing in the SMA requires local government to impose outright prohibitions or undue restrictions on common shoreline developments or uses *e. g.* beach access stairs, children play areas and private docks.

To the contrary, the SMA declares that it “is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses.” *See* RCW 90.58.020. The policy of the SMA as set forth in RCW 90.58.020 strikes a balance between protection of the shoreline environment and reasonable and appropriate use of the waters of the state and their associated shoreline. *See Nisqually Delta Ass’n v. City of DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985).

The balance envisioned by the SMA anticipates that there will be some impact to shoreline areas by development or continued use, repair and maintenance of existing structures or developments. The SMA explicitly states “[a]lterations of the natural conditions of the shorelines and shorelands **shall be recognized** by the department.” RCW 90.58.020. (Emphasis supplied.) Single-family homes are a priority use of the shorelines which falls within allowed alterations of the shorelines.

The counterbalance to this allowed shoreline development is the requirement that “[p]ermitted uses in the shorelines of the state . . . be designed and conducted in a manner to **minimize, insofar as practical**, any resultant damage to the ecology and environment of the shoreline area. . . .” *See* RCW 90.58.020 (Emphasis supplied).

When the SMA was adopted by a vote of the people in 1971, citizens rejected a more stringent version. The will of the people still controls. **Simply**, well meant desires to promote the environment over people are inconsistent with the goals and objectives of the SMA as the law is written.

Public policy decisions are not properly supported by considerations as to what some believe the law should be.

Balance is the Key: Not Preclusion. The Existing Permit System Achieves Appropriate Balance Without Bans or Undue Restrictions.

For the past 30-plus years, local governments have achieved the balance between property rights and the environment largely through the permit process, where a proposal's consistency with the policies of the SMA can be determined on its own merits. The SMA provides more than sufficient guidance to have this determination made on a project-by-project basis without resort to bans or undue limitations.

The City Council would be unwise to adopt an SMP which demonstrates an irrational bias against the existing permit system set up by the SMA by imposing unneeded bans and prohibitions.

Indeed, the Shorelines Hearings Board regularly reviews permit applications for private docks for their potential impacts to views, navigation, and ecological resources. *See, e.g., Fladseth v. Mason County*, Shorelines Hearings Board (SHB) No. 05-026, Conclusions of Law 13-16 (May 2007); *May v. Robertson*, SHB No. 06-031, Conclusions of Law 16-18 (April 2007); *Genotti v. Mason County*, SHB No. 99-011, Conclusion of Law 12 (October 1999).

Our courts have similarly reviewed appeals of permit applications for private development of the shoreline for compliance with the SMA on a case-by-case basis. *See, e.g., Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 203-05 (1994) (reviewing shoreline permit decision for compliance with the SMA); *Bellevue Farm Owners Ass'n v. Shorelines Hearings Bd.*, 100 Wn. App. 341, 355-62 (2000) (upholding Shorelines Hearing Board decision denying permit to construct a dock based on aesthetic and cumulative impacts).

The well-established practice of using the permit process to balance the needs of the shoreline environment with property rights is embodied in the SMA's "no net loss" policy, under which a local government is required to consider a project's consistency with the SMA by measuring a project's impacts against potential mitigation to determine whether the proposed use would result in a net loss of existing shoreline functions. *See, e.g. Stollar v. City of Bainbridge Island*, SHB Nos. 06-024, 06-027, Finding of Fact 10 (September 2007); *Friends of Grays Harbor v. City of Westport*, Environmental and Land Use Hearings Board No. 03-001, Conclusion of Law 24 (October 2005).

Site specific analysis and project mitigation through the SMA permitting process is the correct approach, not bans or undue restrictions.

Protection of the environment does not trump other SMA policies fostering reasonable use and development.

In 2003, the Central Puget Sound Growth Management Hearings Board ruled in Case No. 02-3-0009C that "the primary and paramount policy mandate that the board gleans from a

complete reading of RCW 90.58.020, particularly within the context of the goals and overall growth management structure Chapter 36.70A RCW, is one of **shoreline preservation, protection, enhancement and restoration.**” *Shorelines Coalition et al. v. City of Everett et al.*, CPSGHMB Case No. 02-3-0009C (January 9, 2003), p. 15 (Emphasis in original). After issuance of the Board’s decision in the City of Everett case, the Washington Legislature intervened, enacting Chapter 321 of the Laws of 2003, [ESHB 1933].

Therein, the Legislature stated the SMA shall be: “...read, interpreted, applied, and implemented as a whole **consistent with** decisions of the shoreline hearings board and Washington courts **prior to** the decision of the Central Puget Sound Growth Management Hearings Board in *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology.*” Washington Laws of 2003, ch. 320, Section 1. (Emphasis supplied)

The State Guidelines for revising SMPs acknowledge that there is a “balance” in the SMA regarding the use and development of the shorelines:

The policy goals for the management of shorelines harbor potential for conflict. The act recognizes that the shorelines and the waters they encompass are “among the most valuable and fragile” of the state’s natural resources. They are valuable for economically productive industrial and commercial uses, recreation, navigation, residential amenity, scientific research and education. They are fragile because they depend upon balanced physical, biological, and chemical systems that may be adversely altered by natural forces (earthquakes, volcanic eruptions, landslides, storms, droughts, floods) and human conduct (industrial, commercial, residential, recreation, navigational). Unbridled use of shorelines ultimately could destroy their utility and value. The prohibition of all use of shorelines also could eliminate their human utility and value. Thus, the policy goals of the act relate both to utilization and protection of the extremely valuable and vulnerable shoreline resources of the state. The act calls for the accommodation of “all reasonable and appropriate uses” consistent with “protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life” and consistent with “public rights of navigation.” The act’s policy of achieving both shoreline utilization and protection is reflected in the provision that “permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, in so far as practical, any resultant damage to the ecology and environment of the shoreline area and the public’s use of the water.” RCW 90.58.020.

WAC 173-26-176(2).

The public statements of some City Council Members to the effect that environmental protection should be elevated over other policies of the SMA is outside the law.

Relevant Legislative Enactments.

The Draft SMP fails to consider or acknowledge changes in the last ten years to both the Growth Management Act (Chapter 36.70A RCW) (“the GMA”) and the SMA. Staff and the Planning Commission appear to have the false assumptions that:

- (a) All shorelines are critical;⁵
- (b) Buffers and/or vegetation conservation areas or set asides are required on all shorelines; and
- (c) Existing single-family residences should not be exempt from new generic buffer and vegetation set aside regulations.

Local governments are required to (1) look at the definitions of critical areas, (2) identify science that enables them to distinguish between those areas that are “critical” and those that are not, and (3) enable the SMA to implement its goal of fostering all appropriate uses, consistent with protecting both the environment and navigability. *See* RCW 90.58.020.

It is respectfully submitted that the City Council direct Staff to reexamine the critical area designations for fish and wildlife conservation areas, since not all shorelines are critical areas. A suggested framework for the designation of marine critical areas is set out below.

Suggested Approach for Designation of Marine “Critical Areas.”

There is a three-pronged inquiry for the City Council in assessing fish and wildlife conservation areas designation and regulation under the Draft SMP. First, the shoreline must meet the definition of a “critical area” as defined in the Minimum Guidelines, WAC Chapter 365-190. Second, the City must comply with the SMA Guidelines that require that an SMP “... provide a level of protection to the shorelines that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources.” WAC 173-26-221(2)(ii). Third, the City must comply with the SMA and its policies which allow alteration of the

⁵ The Central Board and the Washington State Attorney General have concluded that blanket treatment of SMA regulated shorelines as critical areas under the GMA is not appropriate. *See, Tahoma Audubon Society v. Pierce County*, CPSGMHB No. 05-3-0004c, Final Decision and Order (July 12, 2005) and AGO 2006 No. 2 at 4 (Jan. 27, 2006) (“The Legislature explicitly repudiated the Board’s conclusion that shorelines of statewide significance are categorically critical areas which must be protected both under the SMA and GMA.”) In *Tahoma v. Pierce County*, the Central Board rejected a wholesale designation of marine shorelines as critical areas and commented favorably on the County consultants’ work distinguishing “high value” and “low value shorelines.” *Id.* at 44. The record in that case included a detailed marine shoreline inventory and ranking of areas according to their quality as habitat for salmon in response to a listing of Chinook Salmon under the Endangered Species Act. *Id.* at 53. Specifically, Pierce County used a “scientific study which included data collection, field observations, and a recognized methodology . . . that can be replicated” to identify “stretches of marine shoreline with high habitat values for salmon.” *Id.* at 4. Using a scientifically replicable method, Pierce County was able to identify and designate approximately 20 miles of its 179-mile of shoreline as salmon habitat justifying a 100-foot buffer. *Id.* at 2.

shorelines, including critical areas, for certain preferred uses, as confirmed by the SMA Guidelines.

1. Minimum Guidelines

The City's definition of "critical areas" (Draft, p.2-9) is too broad and needs to be tied into the Minimum Guidelines. In addition, the definition of "priority habitat" (Draft, p.2-29) is very broad, although admittedly consistent with the State Guidelines. On paper, all waters of the state would become "priority habitat."

WAC 365-190-030, definitions, sets the parameters for a "Critical Area" as distinguished from other habitat.

(6)(a) "Fish and wildlife habitat conservation areas" *are areas that serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the species will persist over the long term.*

WAC 365-190-030(6)(a) (emphasis supplied).

There are a number of qualifiers applicable to a specific habitat area before the City may designate certain habitat as "critical."

- The area must serve a "critical role" in sustaining needed habitats and species for the ecosystem as a whole, and
- The area must be so important to long-term viability that "If altered may reduce the likelihood that the species will persist over the long term."

The regulation goes on to address a number of areas that "may be" considered for designation, but that list is not a short cut to making the factual determination set forth in the initial phrase.

A similar set of qualifications exists in the minimum guidelines for Fish and Wildlife Habitat Conservation Areas detailed at WAC 365-190-130, which specifically rejects the notion that all species must be protected in all locations to the exclusion of waterfront development or enjoyment of waterfront properties and focuses instead on the issue of regional management. WAC 365-190-130.

The City needs to take a broad perspective and place the emphasis on maintaining long-term viability of species, rather than focusing on minor activities with immeasurable impact. A more global focus includes a plan to step up and better control impacts associated with regional stormwater emanating from public roads and utilities.

A second provision of the referenced WAC addresses areas that must be “considered” for designation as Fish and Wildlife Habitat Conservation Area critical areas. *See* WAC 365-190-130(2). The emphasis on the term “considered,” combined with the need to apply the qualifiers from WAC 365-190-030(6)(a) and WAC 365-190-130, demonstrate that a tailored approach is required.

The key point here is that the areas listed must be considered by the City to see if they meet the test for designation as a critical area set forth in WAC 365-190-030(6)(a). The requirement to provide an accurate inventory directed to the distinction between shorelines available for managed activity and those requiring a higher degree of protection is fundamental but missing in the analysis to date provided to the City Council. This oversight must be corrected.

There remains the question of how to deal with the near shore areas where young salmon reside and migrate for several months per year. There is no science stating extensive buffers are required to protect this species’ sporadic use of the near shore area, especially where the existing condition is a highly developed urban waterfront. Existing regulations preclude any new development or construction during this period of use.⁶

Thus, any alteration of the nearshore environment will not reduce the likelihood that salmon species will perish over the long term since the key threat is construction impacts. Modern regulations as set out in the Draft SMP provide for light and other provisions to ensure juvenile salmonids can go under overwater structures.

2. State Guidelines

The State Guidelines, WAC 173-26-221(2), largely defer to the designation criteria set out in RCW 36.70A.170(1)(d).

Truly “critical saltwater habitats” are defined in the SMA Guidelines. These are discrete areas which include “all kelp beds, eelgrass beds, spawning and holding areas for forage fish ... subsistence, commercial and recreational shellfish beds, mud flats, intertidal habitats with vascular plants, and areas with which priority species have a primary association.” WAC 173-26-221(2)(c)(iii)(A). It is unclear if the City intends to protect these areas or the entire nearshore – shoreline owners request clarification.

⁶ *See* State Hydraulic Code Regulations, WAC Chapter 220-110.

3. SMA

RCW 36.70A.480 says it all: Not all salt waters are automatically “critical areas.”

Development and Use Can Occur In or Near Designated Critical Areas

The State Guidelines do not preclude development near or within critical areas. Subject to mitigation, (and commonly a site-specific analysis) docks, piers, bulkheads, bridges, fill, floats, jetties, utility crossings, and “other human made structures” may intrude into or over critical subtidal habitats. WAC 173-26-210-221(2)(b)(iii)(C).

The Guidelines’ emphasis is on a “level of protection.” The goal is to protect “ecological functions to sustain aquatic life and natural resource populations.” WAC 173-26-221(2)(a)(ii). Ecological functions mean the work or role played by “physical, chemical and biological processes” which maintain the aquatic and terrestrial environment. WAC 173-27-020(13). “Sustain” is defined to mean “keep in existence” or “maintain.” Webster’s II, New College Dictionary (1995 Ed.), p.1111.

Once again, the SMA allows preferred or exempt development on or near critical areas. The SMA unequivocally allows “construction on shorelands by an owner ... of a single-family residence ... for his or her own use” RCW 90.58.030(3)(e)(vi) (emphasis supplied).. The term “shorelands” includes “... all wetlands ... associated with tidal waters.” RCW 90.58.030(2)(d) (emphasis supplied).

Nothing in the SMA requires local government to impose outright prohibitions or undue limitations on shoreline development.⁷ Instead, the SMA calls for “coordinated planning . . . recognizing and protecting private property rights consistent with the public interest.”⁸ Our Courts have repeatedly recognized this policy of balancing property rights and the environment:

The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development. The state has developed shorelines through improvement of parks and ramps, construction of bulkheads, ferry docks, etc. As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks.⁹

⁷ See *Nisqually Delta Ass’n v. City of DuPont*, 103 Wn.2d 720, 726 (1984) (RCW 90.58.020 does not prohibit shoreline uses).

⁸ RCW 90.58.020.

⁹ *Biggers*, 162 Wn.2d at 697 (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring); accord *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243 (2008) (J.M. Johnson, J., lead opinion) (“The SMA meant to strike a balance among private ownership, public access, and public protection of the

Wholesale preclusion of development or use is inconsistent with the SMA. The State Guidelines provide that:

(2) The policy goals for the management of shorelines harbor potential for conflict The prohibition of all use of shorelines also could eliminate their human utility and value. ... The act calls for the accommodation of "all reasonable and appropriate uses" consistent with "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life" and consistent with "public rights of navigation."

WAC 173-26-176(2).

The policies and goals of the SMA "shall be the sole basis for determining compliance of the Shoreline Master Program" with GMA Chapter 36.70A. See RCW 36.70A.430(3)(a). The SMA policies control.

Since those policies differ from GMA standards, the public needs to be assured that the proposed regulations for shoreline critical areas comport with SMA Standards.

On the last point, the GMA standard is to "protect" critical areas. The SMA standard is one which fosters balanced development. Again, the SMA explicitly allows "alterations of the natural condition of the shorelines and shorelands of the state, which **shall be recognized** by the Department." RCW 90.58.020 (emphasis supplied).

Permitted priority alterations favor "single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state," and shoreline development which provides an opportunity for a substantial number of people "to enjoy the shorelines of the state." See RCW 90.58.020.

Failure to Include "Social Sciences" or Assess Statutory and Constitutional Limits

The SMA standard for an SMP update is to "utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts" RCW 90.58.100(1)(a).

State's shorelines."); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761 (1998) (The purpose of the SMA "is to allow careful development of shorelines by balancing public access, preservation of shoreline habitat and private property rights through coordinated planning . . .").

Bainbridge Island is an island. Its history is one of connection of the shorelines to the people for multiple uses. What are the social and economic consequences of turning history upon its head by going to a SMP which unduly elevates protection over use of the shorelines? That question is unanswered.

The consequences of this abrupt turnaround from past history and local culture must be studied and considered; they have not.

The City has failed to prepare or acquire **any study** incorporating the social sciences or the economics of extensive proposed new regulation or the social effects or impacts on property owners who may need to deal with nonconforming use and other onerous regulations.

There is **no study** or analysis of how the regulations proposed in the Draft SMP may preclude desired future residential development or invoke the requirements of RCW 90.58 mandating that the County Assessor take into account the effect on property values caused by imposition of onerous new regulations.

Critically Review the Submitted Science.

Allusions are made to the “best available science” in various documents, but the SMA standard is to “utilize a systematic interdisciplinary approach.” *See* RCW 90.58.100(1)(b).

Most cited studies indicating the need for trees and shade to provide micro climate comes from the Midwest, the East Coast and the West Coast in remote forest areas and is based on protecting the temperature from rising in small shallow streams. The concept of micro-climates does not apply to a large tidal body like Puget Sound or the Straits of Juan de Fuca. Shade could never cover or cool baitfish spawning beds. On the hottest summer days in Puget Sound, the sun is high in the sky and strikes all beaches directly except the upper 10 feet of northerly facing beaches with very tall trees on the shoreline or very tall banks – a rare occurrence.

Dr. Michael Dosskey, Research Riparian Ecologist, USDA-Forest Service National Agroforestry Center, University of Nebraska, a recognized expert on the use and limitations of buffers, made an early presentation on the issue of designing protections for resource lands through the use of buffers. He cautioned that studies from one type of situation are rarely transferable directly to another and different physical and geological setting. His program was entitled “...ensure that policies and programs... are based on sound science...”¹⁰

To the extent there are gaps in knowledge, the “precautionary approach” is unwarranted under the SMA. No such standard is found in the SMA, nor can the concept be read into a law

¹⁰ Dr. Michael Dosskey presentation at Law Seminars International “Agricultural Lands in Transition” conference March 11, 2002 in Everett, WA.

which fosters and allows reasoned development and alteration of the natural shoreline for certain preferred uses combined with project mitigation.

The City Attorney will confirm that Bainbridge Island bears the burden to support exactions such as buffers or setbacks. When imposing regulations which exact property, it is not enough to generally cite “the science” and act upon guesses or fears. Hypothetical impacts – “[are] not enough to deny private property owners fundamental access to the application review process, or protection and use of their property.”¹¹

More fundamentally, an adverse impact on the ecology, even if proven by science, does not always trump constitutionally protected private property rights. In this regard, the *HEAL* court held that a restriction of the use of property that is insufficiently supported by best available science violates constitutional nexus and proportionality standards¹²

Once again, the State Guidelines for SMP Updates mandate protection of property rights. See WAC 173-26-186(5) (“Guiding Principles”).

In *Biggers v. Bainbridge Island*, the City of Bainbridge Island’s decision to impose an outright prohibition based on theoretical harm according to the Supreme Court served to exacerbate the “mistaken belief that protecting the environment and private property rights are mutually exclusive interests.”¹³

It is **recommended** that the City Council empower the Office of City Attorney to prepare an analysis of the Draft SMP’s consistency with statutory and constitutional standards, then allow public comment on that assessment.

It is important to recognize that the application of science requires the City Council to ensure that economic and property interests are protected from unsupported and unduly preclusive regulation:

[T]he obvious purpose of the scientific requirement that each agency “use the best scientific and commercial data available” is to ensure that [environmental regulations] not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA’s overall goal of species preservations, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic

¹¹ *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683 at 687 (J.M. Johnson, J., lead opinion). Science cannot be used in isolation from constitutional and statutory requirements. See *HEAL v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 979 P.2d 864 (1999).

¹² *Heal*, 96 Wn. App. at 533-34 (emphasis added).

¹³ See *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring) (“Done right, master plans can serve both needs.”)

dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives. *Bennett v. Spears*, 520 U.S. 154, 176-177 (1977) (reasoning adopted in *HEAL*, 96 Wn. App. at 531). In this regard, the Washington State Supreme Court held that local government must provide a “scientific OSF, evidence of analysis, or a reasoned process to justify [critical area regulations].”¹⁴

No Net Loss

The “no net loss of ecological functions” concept is stated as one of the “Governing Principles” of the State Guidelines. The idea is that SMP provisions, to the greatest extent feasible, protect existing ecological functions and avoid new impacts to habitat and ecological functions.

However, the State Guidelines explicitly allow impacts to ecological functions “necessary to achieve other objectives of RCW 90.58.020,” for example, priority for single-family uses and recreational moorage. See WAC 173-26-201(2)(C).

The concept of “no net loss” is not stated in the legislative findings or policies set out in RCW 90.58.020. “No net loss” cannot go too far, because under the SMA, the law allows “alterations” to even the natural condition for priority uses. See RCW 90.58.020. The State Guidelines mention “no net loss” but state that the concept is “subordinate to the Act.” See WAC 173-26-186(1).

No net loss must incorporate environment gains associated with regional and discrete restoration projects. See discussion *infra*, p.20.

Forced Restoration is Not Legal

While restoration is an objective of the Shoreline Management Act, the Shoreline guidelines recognize that restoration (as distinguished from mitigation) is beyond the reach of local regulatory ordinances:

- (5) The policy goals of the act, implemented by the planning policies of master programs, may not be achievable by development regulation alone. Planning policies should be pursued through the regulation of development of private property only to an extent that is consistent with all relevant constitutional and other legal limitations (where applicable, statutory limitations such as

¹⁴ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 835 (2005).

those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property.

WAC 173-26-186(5).

The SMA as interpreted by the courts is not a law with a focus to preserve the shorelines:

[I]t is tempting to rhapsodize about the pristine beauty of the Nisqually Delta. It is also tempting to express the wish that time and human hands not disturb its natural tranquility. This is not, however, the task before this court. Rather, our obligation is to interpret state and local laws as they apply to the issuance of permits to build an export facility within the City of DuPont in an area designated for urban uses.

In applying the law, we look first to its overall policy. The SMA does not prohibit development of the state's shorelines, but calls instead for "coordinated planning ... recognizing and protecting private property rights consistent with the public interest." RCW 90.58.020. Designation of a shoreline as of "state-wide significance" does not prevent all development. That designation provides greater procedural safeguards, but permits limited alteration of the natural shorelines, with priority given to "residences, ports, shoreline recreational uses including ... industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state ..." RCW 90.58.020.

Nisqually Delta Ass'n v. DuPont, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985).

An excellent analysis of the limits of mitigation and over the line forced restoration is found in the following CLE materials: "MITIGATION vs. RESTORATION, Testing the legal limits," Perkins Coie LLP (Alexander Mackie), 2011, attached hereto as **Exhibit 8**. See also McCormick letter, pp.8-9.

Beware of Regulatory Agency Bias.

The science before the City Council is provided by agency personnel with a narrow perspective of "protecting" the environment. Thus, there is a legitimate concern that the single focus of some scientists or regulators could lead policy-makers to believe they "must" factor in "science" alone without regard to statutory, social, political, legal, constitutional and economic considerations. As one former federal official has stated:

What constitutes an allowable cost is not a matter solely of science. These deliberations require multi-faceted consideration of all of the

consequences of the decision to include the effects on natural resources **and** the legal, social, political and economic consequences of the decision. Resource agencies must follow legislative mandates and rigorous rule making procedures before environmental criteria are codified in regulatory (RCW) or administrative (WAC) codes. Natural resource agencies such as the Department of Ecology and the Department of Fish and Wildlife are not generally charged with making multi-faceted appraisals, they are charged with protecting fish and wildlife, water, air, soil and sediment quality, etc. These one-dimensional tasks lead to one-dimensional thinking that is evident in the *Best Available Science* (Sheldon *et al*, 2005) written by WDOE and even more so in the WDFW recommendations of (Knutson and Naef, 1997) describing perceived wetland and stream buffer requirements for protecting water quality and wildlife.¹⁵

An additional concern is reliance on ad hoc or personal views of regulators instead of true peer reviewed science. For instance, it appears that some of the City's "Technical Advisors" use the work of the Aquatic Habitat Guidelines Working Group. If one looks at the website for this "working group," it states that the agencies involved in the multi-agency project "do not necessarily endorse any of the information provided by these links," which include the guidelines the Working Group favors. If one reads further, it is acknowledged that the guidelines are based upon the Working Group's personal perception of "ecological values" and their assumptions about how ecosystems function, and "our priorities for protecting aquatic systems."

The Working Group's membership includes no policy-makers. The Working Group's guidelines are not adopted as rules and regulations under the Administrative Procedures Act, RCW 34.05. Further, none of its member guidelines involve any analysis for consistency with SMA policies or consideration of private property rights.

This is a group of public employees who appear to be pushing an agenda which has not seen the light of day through public review and comment via consideration or adoption of rules and regulations. Under the Washington Administrative Procedures Act, "general policies" (if the guidelines could be so considered) are illegal and unenforceable unless adopted as a rule or regulation which includes a public review and comment process. *See* RCW 34.05.010(16); RCW 34.05.375.

Going on, the WDFW has identified certain fish and wildlife species or habitat that it considers a priority for management and conservation, and has published a document entitled "Management Recommendations for Priority Species" which is intended to "assist" reviewing

¹⁵ Dr. Kenneth M. Brooks, *Supplemental Best Available Science Supporting Buffer Widths in Jefferson County*, Washington, p. 3. (2007)

agencies, planners, landowners and members of the public in making land use decisions.¹⁶ By design, these Management Recommendations are merely “generalized guidelines” without the force of law: “[These] Management recommendations are not intended as site-specific prescriptions but as guidelines for planning.” See WDFW, Management Recommendations for Priority Species, Volume IV, Introduction (May 2004).

Because they are general guidelines, the law does not mandate use of the Guidelines as official, binding performance standards for the regulation of land development and uses.

Minor Incremental Alteration or Expansion of Existing Homes or Normal Appurtenances Is of No Concern.

The City should allow incremental redevelopment with insertion of a strong policy statement that such development is not considered a threat to the aquatic environment.¹⁷ The stated policy would be implemented through a simple Best Management Practices Handbook.

The regulations in the current version of the Shoreline Family Residence Mitigation Manual, Appendix D, are excessive and disproportionate; they will not survive an “as applied” challenge. See McCormick letter, pp.7-8, Young letter.

To ameliorate potential “no net loss” concerns related to minor incremental development, the City should recognize the benefits of regional restoration. The State Guidelines mandates such recognition. See WAC 173-26-186(8)(c).

Over time, PSP’s regional restoration efforts will provide a major net gain to the environment. These gains will more than offset the almost immeasurable incremental impacts that may be associated with minor redevelopment of the existing built environment in shoreline areas.

It is **recommended** that the Council receive a report on the work of the Puget Sound Partnership (“PSP”), its “Action Plan,” and the Puget Sound Nearshore Ecosystem Restoration Project before considering the final standards for incremental redevelopment, alteration or expansion of single-family homes.

The net gains associated with the PSP Action Plan must be a factor for consideration.

¹⁶ The WDFW is charged with protection of fish and wildlife species, in terms of their harvest or non-harvest, but has very limited authority over their habitat. Instead, the state legislature has determined that protection of wildlife habitat will be achieved through the GMA, the SMA, the Forest Practices Act (FPA), and the State Environmental Policy Act (SEPA), as well as through local government planning processes. See WDFW, Management Recommendations for Priority Species, Volume IV, Introduction (May 2004).

¹⁷ Specific projects can be mitigated on a case-by-case basis.

Illegal Forced Imposition of Public Access.

The Draft SMP has many sections which address public access over privately owned property. It is **recommended** that the City Council request guidance from the Office of City Attorney on the limits of the City's authority to exact public access. Helpful guidance is found in "THE SHORELINE MANAGEMENT ACT AND PUBLIC ACCESS, a Critique of Common Practices and Limitations on 'Furthering Substantial Governmental Purpose' When Considering Public Access Requirements for Washington State Shorelines under the Shoreline Management Act," Alexander Mackie, Perkins Coie LLP, March 25, 2011 (attached hereto as **Exhibit 9**).

Specific Comments

Section 1.1, Introduction. The language in this section correctly notes that policies of the Shoreline Master Program are a component of the City's Comprehensive Plan. But more needs to be said. It is a requirement under state law that a Draft SMP be consistent with Comprehensive Plan policies and its provision be internally consistent.¹⁸ The City **needs** the two consistency analyses completed, and then, allowance of public comment on them. While there have been numerous comment opportunities, the parts do not equal the whole, so a consistency analysis is required to allow effective public comment.

Section 1.1.1, Purpose and Intent. The language in this subsection (and other portions of the Draft) refers to "restoring shoreline resources." In many instances, the restoration requirement is stated in prescriptive terms that is, as a mandatory obligation. This results in an illegal law plus one that is internally inconsistent, because in some sections of the SMP, the City correctly acknowledges that restoration must be voluntary.

Section 1.2, SMA Requirements. It is not correct to state that the SMA's "paramount objectives are to protect and restore the valuable natural resources" that shorelines represent. The SMA is about balance and reasonable alteration of the aquatic environment. It explicitly protects private property rights. See discussion, *infra*, pp.6-7. The Guidelines require two equal goals of the SMA be applied to an SMP Update. After describing the potential for conflict, the Guidelines state in Subsection (2) "... Thus, **the policy goals of the act relate both to utilization and protection** of the extremely valuable and vulnerable shoreline resources of the state." (Emphasis supplied). And, in Subsection (3), "The **act's policy of protecting ecological functions, fostering reasonable utilization**, and maintaining the public right of navigation" See WAC 173-26-176 (2) and (3) (emphasis supplied).

¹⁸ Pursuant to the limited GMA/SMA integration, review of a new or revised SMP is measured only against compliance with the policies and requirements of the SMA and the Shoreline Guidelines (WAC Chapter 173-26) and the "internal consistency" provisions of RCW 36.70A.070, RCW 36.70A.040(4), RCW 35.63.125 and RCW 35A.63.105. See RCW 90.58.190(2)(b); RCW 36.70A.480(3). What this means is that a SMP must be consistent with Comprehensive Plan policies and its own provisions must be internally consistent.

Section 1.2.1, SMA Administration. The SMA is a cooperative effort, but one in which the state has dominant authority. For instance, the City must not violate the terms of the SMA or the State Guidelines which apply to an update of a Shoreline Master Program or other general laws of the state.

Section 1.2.2, Scope of SMA. The language here states “The purpose of a shoreline master program is to protect shoreline resources, manage the uses and activities on shorelines, and assure continued public use of waters of the state.” This language is too narrow and misstates the Guidelines, WAC Chapter 173-26, in particular, by failing to point out the mandatory accommodation for water dependent preferred uses *See infra*, pp.6-7.

Section 1.2.3, Development of City SMP. The “precautionary principle” mentioned in the Guidelines is illegal, but more importantly, is inapplicable on Bainbridge Island because there are comprehensive near shore studies by Battelle which set out in detail existing conditions and existing resources. *See Draft SMP, Section 2.1, p.16.*

A serious matter for the City’s deliberations is the effect of science urged by some without regard to requirements to protect private property rights. The *Heal* court held that a restriction of the use of property that is insufficiently supported by best available science violates constitutional nexus and proportionality requirements:

[P]olicies and regulations adopted under the GMA must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications . . . Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal. The rough proportionality requirement limits the extent of the mitigation measures, including denial, to those which are roughly proportional to the impact they are designed to mitigate. . . .

. . . [F]or example, if the City proposed a policy prohibiting development on slopes steeper than 40 percent grade or requiring expensive engineering conditions for any permitted project, only the best available science could provide its policy makers with facts supporting those policies and regulations, which, when applied to an application, will assure that the nexus and rough proportionality tests are met. If the City failed to use the best available science here in making its policy decision and adopting regulations, the permit decisions it bases on those regulations may not pass constitutional muster under *Nollan* and *Dolan*. The science the legislative body relies on must in fact be the best available to support its policy decisions. Under the cases and

statutes cited above, it cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make. If it does, that decision will violate either the nexus or rough proportionality rules or both.

Heal, 96 Wn. App. at 533-34 (emphasis added).

The State Guidelines in this regard mandate protection of property rights. *See* WAC 173-26-186(5) (“Guiding Principles”).

Section 1.3, Bainbridge Island Shoreline. This section correctly notes that “most of the waterfront on Bainbridge shorelines has been developed with single family residences” It further correctly recognizes the balance required under the SMA for allowance of use of the shorelines by individual residential property holders.

The case law states that the SMA embodies a public trust doctrine. The balance inherent in the SMA precludes the Council considering comments to the effect that “the public’s” rights control over the rights of individual property owners. This is a misstatement of the law.

Section 1.3.4, Relationship to Other Plans and Regulations. Subparagraph 5 addresses a “conflict” between the SMP and other laws. This language should be eliminated because confusing. In addition, the City has no business determining if a “conflict” exists as to application of laws it does not administer. It is enough to recognize that the owners/applicant’s activities on the shorelines may be regulated by other local, state, and federal laws.

Section 1.3.5, Applicability of SMA. This section explicitly states that “the provisions of the program apply to new development activities and are not retroactive.” This is in accordance with the State Guidelines which preclude imposition of new regulations to the built environment.

Because provisions of the SMP apply only to new development, if existing development complies with the provisions of the 1996 Shoreline Master Program, **it is “conforming.”**

Thus, the correct focus is on the proper measure of regulation of incremental new development or new activities on existing lots that are already developed, not whether it is “nonconforming.” Regulation of incremental changes to existing homes on residential property is a separate concept from “nonconforming” and should be dealt with in a section other than under “Nonconforming.”

The City needs to be careful when it states “all uses, and developments;” even those uses and developments not meeting the definition of development for purposes of requiring a substantial development permit must comply with the provisions of the SMP. *See also* SMP at 4.1.2.4.1:

All shoreline use and development, including preferred uses, and uses that are exempt from permit requirements shall be located ... and maintained in a manner that protects ecological functions ... such that all shoreline uses and activities: ... c. **Minimize interference with beneficial natural shoreline processes such as ... erosion and accretion**

SMP, p.62.

The Shoreline Hearings Board has held that such broad language effectively turns an exemption into a permit, and this result is not allowed under the SMA. This language mandates compliance with all provisions of the SMP, including its use regulations, not just policies.

The Shoreline Hearings Board struck down a similar process when it invalidated the SMA Rules:

Part III of the guidelines regulates exempt uses by requiring that local governments issue **letters of exemption** to cover activities that are not subject to permit requirements. Those letters must set forth a statement that "All uses and development occurring within the shoreline jurisdiction must conform to chapter 90.58 RCW, the Shoreline Management Act and this master program." WAC 173-27-190(2)(3)(iii)(A). Part IV of the guidelines requires, in the case of exempt developments, that the **letter of exemption** include conditions "where necessary to ensure that the development does not cause significant ecological impacts or contribute to potential adverse cumulative impacts." WAC 173-27-300(2)(g)(i). Under Part IV, the master program must include a mechanism for assuring that the development meets the mitigation requirements of the **letter of exemption**. This may include a performance bond. WAC 173-27-300(2)(g)(ii). Local governments must also provide a means for final inspection of exempted development and send the results of final inspections to Ecology.

* * * *

The provisions governing letters of exemption under [Department of Ecology Guidelines] exceed the statutory authority of the SMA. The provisions are therefore invalid. The [required] letter of exemption operates as a permit. It sets forth conditions and requires enforcement mechanisms for those conditions including, possibly, a bond. These terms create a new permitting process for activities that are specifically exempt from shoreline permit requirements. The letter of exemption created [by Ecology] is also

devoid of the procedural requirements of a shoreline permit, or for that matter, any other land use permit. Additionally, the conditioned letters of exemption do not give notice to the public as required under RCW 90.58.140 or an opportunity to appeal the terms of the letter of exemption under the SMA, RCW 90.58.140 or an opportunity to appeal the terms of the letter of exemption under the SMA, RCW 90.58.180(1), for the permittee [*sic*] or an aggrieved third party. *Putnam v. Carroll*, 13 Wn. App. 201 (1975). Because the new guidelines [by Ecology] essentially create a permit for activities that are specifically exempt for shoreline permits, [they are] invalid.

See SHB Case No. 00-037 (Order Granting and Denying Appeal, 2001); 2001 WL 1022097. (Emphasis supplied).

A case in point of exemption regulation overkill is beach access stairs. The Draft SMP limits access stairs and prohibits them unless there is a bulkhead, including a bulkhead at the toe of a "feeder bluff." And then, the Draft generally prohibits a bulkhead on a feeder bluff. The 120 foot square size limit size is totally unworkable. To limit repair and replacement of access stairs to 120 feet is a directive to take out existing stairs. This is the case because under the Draft, all beach access stairs are deemed "nonconforming." The overall result is an illegal imposition which affords no amortization period and, more fundamentally, serves no overriding public purpose. Essentially, the Draft precludes private recreational access to the shorelines for the old, very young, and those who are afraid of rope ladders and heights.

Section 1.4, Restoration Planning. Herein, the Draft SMP correctly states that restoration is intended to be accomplished through voluntary and incentive based public and private programs. However, as previously noted, other sections make restoration mandatory, thereby creating an illegal inconsistency.

Section 1.5, Master Goal. The language "and achieves a net ecosystem improvement over time" is beyond the resources of the City to accomplish. The language should either be taken out, or tied into regional restoration activities so it does not become a burden on local property owners. See PSP discussion, *infra*, p.20.

Section 3.2.2.3, Upland Designations (Management Policies). Subsection 2 states "new development" should be permitted only on those shoreline areas capable of supporting the proposed use in a manner which protects "or enhances" the shoreline environment. This policy goes beyond the SMA requirements. The SMA allows for uses and developments on the shoreline, including single family homes. There is no requirement that these homes must "enhance" the shoreline environment.

Section 3.2.3, Shoreline Residential Conservancy. This category is nonsensical. The **admitted** local circumstance is an existing pattern of high shoreline residential development.

For instance, Port Blakely has significant residential development which has not been factored into the analysis since staff used 2001 information. *See* Sutherland comment letter, attached hereto as **Exhibit 10**. *See also* CIA, Table 3-6, p.26.

The City prepared a Cumulative Impacts Analysis to support its ban of private single-use docks in Port Blakely. Therein, the study admits that under existing zoning (and comprehensive land use policies) Port Blakely could be developed with 40 to 50 new homes over a reasonable period of time. *Ibid* (CIA, Table 3-6). Thus, the community plan for the Harbor is at least moderate residential growth as allowed under current zoning. For instance, 20 new single-family homes are projected for the "residential conservancy" portion of Blakely Harbor over the next 20 years.

Exactly how the City believes Port Blakely (and other bays or harbors) can "protect, conserve and restore shoreline ecological functions of open space, floodplains and other sensitive lands" when the existing development and growth patterns is more urban in intensity is nonsensical.

There are no large areas in Port Blakely or, for that matter, other areas of the Island designated Shoreline Residential Conservancy that are sufficiently undeveloped to provide functions of open space, floodplains or other sensitive lands. The designation is simply a backhanded way to control development in a way which conflicts with the SMA and the State Guidelines.

The State Guidelines mandate that the environmental designation system "**shall be based** on the existing land use pattern, the biological and physical character of the shoreline, and the goals and aspirations of the community as expressed through the comprehensive plans as well as the criteria in this section." *See* WAC 173-26-211(2)(a) (Emphasis supplied.) *See also* WAC 173-26-211(3) (Consistency between shoreline environment designations and the local comprehensive plan).

This section is not supportable under the Guidelines because it employs the wrong criteria, using only one of the three required elements--the biological and physical character of the shoreline--and then, with resort to outdated information.

The City Council requires an analysis of the Comprehensive Plan, its policies and land use designations, and Staff must then apply the analysis to the Draft SMP.

Section 3.2.3.3, Management Policies, Shoreline Residential Conservancy. Herein, the City states that only development that "enhances or results in restoration of ecological functions" is encouraged. This is illegal forced restoration. The strong preservation language conflicts with

the SMA provisions which allow alteration of the natural condition for preferred uses, *e.g.*, single-family homes, and does not accord with local circumstances.

Section 3.3.1.3, Management Policies for Aquatic Designation. The phrase “uses that adversely impact the ecological functions ...” is not consistent with the SMA or State Guidelines. “Adversely impact” is a much broader term than “no net loss.” *See* McCormick letter, Exhibit 1 hereto, p.6. The meaning of the language “compatibility between upland and aquatic uses should be confirmed...” is not clear.

Section 3.3.2.1, Purpose, Priority Aquatic. To “restore” aquatic areas is beyond the limits of City and state authority under the SMA. In each instance where “restore” is used in the Draft SMP, it should be modified with the word “voluntary.”

Section 3.4, Shoreline Residential and Shoreline Residential Conservancy Designation Strategy. The Environmental Technical Advisory Committee employed a “natural resource management” strategy or perspective as criteria to determine the Shoreline Residential Conservancy Designation. First, this is unlawful delegation: the City Council must establish the criteria, not a technical committee. Second, the criteria employed are inconsistent with WAC 173-26-211 and the Guidelines control. *See* comments, *infra*, p.27. Third, the designation fails to reflect local circumstances.

The stated “purpose” of the Shoreline Residential Conservancy environment is about protection and conservation of “natural resources,” ecological functions and “valuable historic and cultural resources to provide for “sustained natural resource use, achieve natural flood plain processes and provide recreational opportunities.” *See* WAC 173-26-211(5)(b) (i).

Bainbridge Island does not have significant forest or mining areas, or natural resources based industries, to justify the designation. It does not have important “flood plains” or regionally important valuable historic or cultural resource use. Over 30% of the Island is already designated as open space.

The uses “appropriate” for the Rural Conservancy designation include “... low-impact outdoor recreation uses, timber harvesting on a sustained yield basis, agricultural uses, aquaculture, low intensity residential development and other natural resource-based low intensity uses.” *Ibid.* Boating facilities, angling, hunting, wildlife viewing trails and swimming beaches are the “preferred uses.”

The City is just that – a city. It must accept mandated growth for “urban infilling” under the Growth Management Act. The uses contemplated under Shoreline Residential Conservancy designation conflict with the City’s land use patterns, the Comprehensive Plan, the local circumstances and common sense.

Section 4.1.1, Shorelines of Statewide Significance. Some context is in order. It has been my experience that the concept of “shorelines of statewide significance” has been misunderstood by some local planners. The Shorelines of Statewide Significance designation does not change the balance of the SMA in terms of reasonable use and development of shorelines. Let me explain.

First, the SMA does not elevate the preservation of undeveloped shorelines above all other SMA goals and policies without adequate justification or basis, even on shorelines of state-wide significance. This point was emphasized by the Supreme Court in *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985).

Second, under the SMA and cases construing its policies, designating a shoreline as being of state-wide significance only “provides greater procedural safeguards;” it does not prohibit “limited alteration of the natural shorelines” for reasonable and appropriate shoreline uses, especially the preferred water-dependent uses such as private residential docks and piers. *Nisqually Delta Ass'n v. City of DuPont, supra*, at 726.

The quoted language emphasizes that the designation of a shoreline as one of state-wide significance does not eliminate the balance that inheres in the policy of the SMA between protection of the shoreline environment and reasonable and appropriate use of the waters of the state and their associated shorelines. RCW 90.58.020; *see also* WAC 173-26-176(2); *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); *State Dept. of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 557 P.2d 1121 (1974).

Section 4.1.2.1, Applicability (Environmental Impacts). The language “adverse impacts” is too broad and inconsistent with the State Guidelines and “no net loss.” *See* McCormick letter, p.6. If the City insists upon using this term, it must interpose the word “significant” before the word “adverse.” All development in one way or another has some impact, even if immeasurable. The law does not require that each and every consequence of development be mitigated or development denied. If that were the case, there could be no use or development of the shorelines because it is impossible to construct a bulkhead, dock or home without some impact or change to the environment. If the law was to the contrary, “no change in land use would ever be possible.” *See Maranatha Mining v. Pierce County, supra*, at 804. In this regard, the language set out in 4.1.2.3(3) is excellent and a good base to rewrite Section 4.1.2.1.

Section 4.1.2.3, Policies (Environmental Impacts). In Subparagraph 4, the City **must consider** the beneficial effects of existing regulatory systems managed by other agencies with jurisdiction.

Section 4.1.2.4, Regulations – Impact Analysis and No Net Loss Standard. No net loss is not an explicit standard found in the SMA except for (1) incremental changes or alterations to existing home, and (2) perhaps to developments in or adjacent to marine critical areas. In the

Guidelines, it is intended as a more global standard, not necessarily applied to site-specific development.

As to the Standard Residential Mitigation Manual, Appendix D, the required mitigation is totally disproportionate to any expected impact from minor alteration, expansion or repair of single-family homes. These standards will not hold up in an "as applied" challenge.

Addressing constitutional standards, case law establishes rigorous requirements for nexus and proportionality which have been set forth by the United States Supreme Court and elaborated upon in Washington. *See, e.g., Nollan v. Cal. Coastal Comm'n, supra.; Dolan v. City of Tigard, supra.; Benchmark Land Co. v. City of Battleground*, 103 Wash. App. 721, 14 P.3d 172 (2000), *aff'd on other grounds in Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 695, 49 P.3d 860 (2002); *Burton v. Clark County*, 91 Wn. App. 505, 520, 958 P.2d 343 (1998) (County conditioning of approval of a three-lot short plat on the landowner's dedication of road right-of-way constitutes unconstitutional taking).

The reason for requiring the municipality to demonstrate the impact of the development is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).¹⁹

Most importantly, the burden is on the City to justify its regulations, *e.g.*, forced restoration of existing front yards or new buffers, setbacks or vegetation protection zones.

¹⁹ Although a governmental agency can condition or deny a proposal based on SEPA, the agency must comply with certain statutory and regulatory requirements. *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 752, 765 P.2d 264 (1988). Those requirements are contained in RCW 43.21C.060, which limits the exercise of substantive SEPA authority to condition preliminary plat and other land use approvals.

First, a project may be conditioned or denied "only to mitigate specific environmental impacts" identified in the environmental documents prepared under SEPA. RCW 43.21C.060. Under this statutory limitation on exercise of SEPA substantive authority, land development may be conditioned "only on the basis of specific, proven significant environmental impacts". *Levine v. Jefferson County* 116 Wn.2d 575, 807 P.2d 363 (1991), quoting *Nagatani Bros., Inc. v. Skagit Cy. Bd. of Comm'rs*, 108 Wash.2d 477, 482, 739 P.2d 696 (1987). The "specific adverse environmental impacts" that a developer may be required to mitigate must be directly related to the proposed development. That is, mitigation measures can only be imposed "to the extent attributable to the identified adverse impacts" of the proposal. WAC 197-11-660(d). These identified adverse impacts must also be "significant adverse impacts," as some impacts are always present in any land use. *See, e.g., WAC 197-11-350(2); RCW 43.21C.060; Maranatha Mining Inc. v. Pierce County*, 59 Wash. App. 795, 801 P.2d 985 (1990). The term "significant" is defined in SEPA to mean "a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794(1).

Second, the mitigating condition imposed under SEPA must be based "upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency." RCW 43.21C.060.

Third, mitigation conditions imposed under authority of SEPA "shall be reasonable and capable of being accomplished." RCW 43.21C.060.

Section 4.1.2.5, Regulations/Revegetation Standards. It should be **made explicitly** clear that these standards apply only to new development, uses or activities; otherwise, there is an internal inconsistency.

In addition, the SMA allows single-family homes, including clearing and grading which is exempt. *See* WAC 173-27.

This entire section is extremely complex and overly broad. For example, the requirement to attain a 65% native vegetation canopy coverage within ten years is totally disproportionate. The requirement to provide a list of proposed plants for disturbance of only 120 feet (the average size of many professional offices on the Island) is overly broad. The City Council should consider why such micromanagement of development is desired. This section mixes in concepts for stabilization projects; this language should be moved out and placed in Section 6.1.

The requirement to plant in a manner “outside of the shoreline buffer” which “promotes a contiguous vegetated corridor” to the shoreline is likely impossible to enforce. If the intent is to surround residential homes by new plantings and trees, this is a huge over-regulation for a priority use of the shoreline. *See* Young letter.

Section 4.1.2.6, Regulations-Mitigation. The mitigation sequencing which commences with “avoiding the impact altogether” is inconsistent with the State Guidelines and SMA which allow preferred uses and development of the shoreline, especially for single-family homes. The City under the guise of mitigating a proposal cannot prevent development that is allowed and encouraged. It is unduly onerous to require property owners who do not use the Single-Family Residential Mitigation Manual to prepare a mitigation report using “pertinent scientific and technical studies....” The requirements to monitor the mitigation and provide a surety are overly broad as to development of single-family homes and appurtenant structures. Taking the exemptions for a single-family home found in the SMA and imposing such onerous requirements is inconsistent with the SMA. The Legislature already made a choice that single-family home development is so benign (and desired) that a shoreline substantial development permit is not required.

Section 4.1.2.9, Submittal Requirements: Site-Specific Impact Analysis and Mitigation Plan. The Council is referred to the detailed requirements found in this section. This section provides extensive authority to the Administrator to require inventories, analysis, assessments, descriptions, planting and soil specifications, and other information to simply site and construct a single-family home. Requiring an “adaptive management plan” if the mitigation fails is way beyond any reasonable impacts that could be expected from residential development. This concept is appropriately applied only to major industrial or commercial projects on large plots. This section requires the sound judgment of the City Council if litigation is to be avoided.

Section 4.1.3, Vegetation Management. This section does a good job of stating that vegetation standards do not apply retroactively to existing uses and structures. They should also

not apply to changes or alterations which are of a minor nature. In other words, it is nonsensical to apply vegetation management requirements for **new development** of shoreline lots also to minor alterations or expansions of **existing development**. The impacts between the two are not comparable because there is no net loss associated with existing development. Again, "no net loss" is a prospective, not retroactive, term.

The language in this section which includes "conservation activities" to "restore vegetation on or near marine or freshwater shorelines" is illegal forced restoration. The City needs to modify this language or risk appeals based upon inconsistency with the SMA.

Section 4.1.3.4, Regulations - Exceptions. The exceptions here are well set out, but language **should be inserted that the nonconforming uses and developments referenced are only those which are nonconforming with the 1996 Shoreline Master Program.** In this way, the language is internally consistent with Subsection 4.2.1, below.

Subsection 2 which states that "no vegetation clearing, grading or construction" may be undertaken within the shoreline without review and approval of the Administrator is too broad. The City should simply exempt minor clearing and grading (associated with residential home development) consistent with the SMA exemptions.

The site-specific vegetation area is too extreme. The Zone 1 and Zone 2 buffers with setbacks add up to at least 70 feet. Even a change in the landscaping invokes the new requirements. These restrictions will not survive an "as applied" challenge.

Section 4.1.3.7, Regulations – Setback View Requirement. The City has no authority to preserve existing views enjoyed by a single-family primary structure; at most, minimizing impacts may be required. Preservation of views of adjoining properties effectively imposes an illegal view easement for private use.

Section 4.1.3.8, Regulations-General Vegetation Alteration Standards. These standards provide unfettered discretion to determine what is allowed for cutting or maintaining vegetation, on the one hand, and reestablishing vegetation on the other. The stated standard that an applicant must demonstrate "to the satisfaction of the Administrator" that the vegetation removal is the "minimum necessary" to reestablish or establish a view is vague and ambiguous as to a regulatory standard; most likely, it is unenforceable. Insertion of the word "reasonable" before "satisfaction" will help.

Section 4.1.3.9, Vegetation Alteration Standards – Residential Development. There is no explanation why structures are prohibited in Zone 1 when upland of a Priority Aquatic Designation. The few small structures or developments that are allowed within Zone 1 have no measurable impact upon the environment. It is unclear whether water related structures that are allowed in Zone 1 "including a boat house, permeable deck, boat storage or staircase" are **cumulative** or a property owner is allowed only one of the stated structures.

Section 4.1.4, Land Modification. The policies set out in this section are generally sound, except the language “avoid and minimize potential adverse impacts” should be modified by use of the word “significant” or, even better, resort to the no net loss standard. See McCormick letter. These policies attempt to “protect” existing vegetation or force new plantings under the guise of mitigation. In light of the policies set out in Section 4.1.4.2, it is strongly recommended that the entire section on vegetation conservation and protection be rewritten.

Section 4.1.5, Critical Areas. It is not clear what marine near shore areas constitute “critical areas.” The policies, Section 4.1.5.3, conflict with other policies in the Draft SMP which allow residential use and development on the shoreline. These sections allow water-dependent uses on the shorelines as preferred uses, including single-family residential development and use.

Section 4.1.5.5, Regulations – Fish and Wildlife Conservation Areas in Critical Saltwater Habitat. There is no clear explanation of what constitutes “critical” saltwater habitat or fish and wildlife conservation areas. Subsection 6 applies the “maximum prescribed buffer areas for activities adjacent to fish and wildlife conservation areas.” It is uncertain what the “maximum prescribed buffer” mentioned in Subsection 7 may be. Requiring a private property owner to conduct an inventory of a site proposed for development “and adjacent beach sections” to assess the presence of critical saltwater habitat and functions is overly broad. Why is the existing Nearshore Study inadequate?

Section 4.1.6, Water Quality and Storm water Management. There is no need to place into the SMP water quality and storm water management. All the City has to do is refer to its existing regulations.

Section 4.1.8, Shoreline Restoration and Enhancement. This section cannot be read any other way but imposing mandatory restrictive requirements to actually create “net ecosystem wide improvement in the shoreline environment” over time. The basis for this unprecedented authority is not set out. In addition, the City has little control over the Puget Sound region itself. The SMP should simply mention and defer to the Puget Sound Partnership as to shoreline restoration and enhancement, and leave the City’s efforts to those of voluntary projects.

Section 4.2.1, Nonconforming Development. The Draft SMP appears to state that only development constructed prior to the effective date of the initial Master Program (November 26, 1996) or its amendments,²⁰ which “do not conform to present regulations or standards” of the (new) Master Program is “nonconforming.”

In other words, if existing development is in compliance with the 1996 Master Program, it is “conforming” because the SMP explicitly does not apply new buffers or vegetation

²⁰ The New SMP is a stand-alone document.

protection requirements to the built environment. Thus, whether the City says it or not, existing development in most instances is “conforming” per the SMP language.

It will, however, be easier to understand the regulations if language is added stating that uses complying with the 1996 Master Program are conforming under the New SMP. This would aid the public’s understanding and prevent an internal inconsistency with the definition of nonconforming set out in Section 7.

The clear statement in Section 4.2.1.1 runs up against Section 4.2.1.2 (Goal). These two sections are inconsistent as presently drafted. The City recognizes legally established primary residential structures and yet “over time” requires that the structures and uses “conform as completely as possible to this program”

Section 4.2.1.3, Expansion of Lawful Residential Structures. The policies found in this section should be taken out of the section for “nonconforming development” because existing structures in compliance with the 1996 Master Program appear conforming by the plain language of the SMP. Thus, the City should draft a stand-alone section for minor alterations or expansions of residential development which is proportionate and legal. This avoids confusion; it also avoids future “as applied” challenges.

Section 4.2.1.6.3, Nonconforming Structures – Residential Single-Family: Primary Structure. It should be made explicitly clear that the structures referenced are those that do not conform to the requirements of the 1996 Bainbridge Island Shoreline Master Program.

It is noted in Subsection 5 that there is an acknowledgement that new vegetation can be required “only to the extent feasible.” Why new vegetation requirements should apply to the alteration of existing structures for an incremental 10% increase in gross floor area or if the expansion exceeds 50% of the replacement cost “of all structures on the subject property” is not explained. Does the City have a site specific analysis that demonstrates an actual nexus and measurable impact?

Again, this is forced restoration plus disproportionate regulation.

Section 5.9, Residential Development. In Subsection 5.9.1, Applicability, the language that development of a residential home must comply with “this section and other provisions of the Master Program” goes too far. There is no authority in the SMA to effectively make exempt development in fact subject to discretionary permitting requirements.

Section 5.9.2, Goal (Residential Development). This language should be rewritten as follows:

Promote priority residential development opportunities along the shoreline consistent with state policies allowing alteration of the

natural environment for residential home use. Residential development should minimize impacts to the aquatic environment and be coordinated such to generally allow other uses including the public's right to navigation and use of the waters of the state for recreation.

Section 5.9.3, Policies (Residential Development): There is no authority to mandate that single-family residential use "improve" shoreline ecological functions and processes. The language "be physically compatible with adjacent cultural and shoreline features, reasonable in size and purpose" is no more than regulation via an administrator's personal taste. See Young letter. These terms are unreasonably vague and unenforceable.

The language "and enhance" shoreline vegetation is illegal forced restoration.

In Subsection 4, which discusses development of side yards and the restriction to preserve vegetation between developments, is inconsistent. To require preservation of vegetation, on the one hand, and to enhance "public and private view potential" on the other, is impossible: significant vegetation blocks views. Subsection 11, Voluntary Restoration for New Residential Development and Alterations, is excellent. I believe, however, that it is inconsistent with Subsection 10, which mandates that residential development "should include measures to protect existing vegetation and/or restore vegetation along shorelines."

Section 5.9.5, Regulations-General (Residential Development). In Subsection 6, the requirement that "residential development shall meet all provisions of Section 4.1.2., environmental impacts," is too broad.

Section 5.9.6, Regulations-Primary Residence Design and Location. The requirement that residential development "shall" be located and designed to avoid the need for shoreline stabilization is illegal and unenforceable. The SMA allows protection of single-family homes.

The requirement that homes be located to protect existing views from adjacent primary structures is also illegal, effectuating a public taking for a private purpose. The Guidelines at most allow regulations which "minimize" impacts. See WAC 173-26-221(4)(d)(iv).

The requirement that the home be designed to "provide a physical separation to reinforce the distinction between public and private space" is unintelligible. What does that mean?

Section 6.1.2., Goal. This section is inconsistent with the SMA and its priority given for protection of waterfront homes constructed before 1991. More importantly, it is based upon surmise, not actual facts, and ignores the beneficial aspects of the existing regulatory system.

Modern systems which mandate less intrusive location of bulkheads and shoreline armoring prevent the horror stories seen in the past, where large fills and seawalls were allowed

well below the ordinary high water mark, with attendant significant adverse impacts. A former WDFW official and biologist with substantial permitting experience confirmed this point:

First, some historical perspective, based on my 18 years as a marine fish biologist and fishery manager with Washington Department of Fisheries, is useful. Prior to the discovery of upper intertidal (mostly in the +6 to +10 foot MLLW elevations) spawning by surf smelt, Pacific sandlance, and rock sole in sand/pea gravel substrates in reaches of many shorelines in the 1970s and 80s, many bulkheads were built over this intertidal zone without much general public regard for the value of the intertidal to salmonids or forage species that depend on this zone. Many shoreline residents did not, not only to protect property, but also to increase dry land. Regulations and policies were appropriately promulgated to severely restrict indiscriminant construction of marine bulkheads. This was especially true below the Mean High Water (MHW) elevations on beaches with documented forage fish spawning. It is my understanding that the waterward edge of the proponents' proposed bulkhead is sited well above the MHHW elevation, near or above the Ordinary High Water Mark (OHWM).

* * *

A rock bulkhead will not eliminate overhanging vegetation, shade, availability of terrestrial insects, or leaf litter. This is evident from other sites I have visited, where the bulkhead is landward of the MHHW tidal elevation. As woody material breaks off in high wind or dies and rots, it will fall down over the top of the bulkhead. The new bulkhead would allow more vegetation to grow and actually save the trees (valuable for bald eagle perching) at this site. I have seen many other examples of stabilized riparian trees overhanging rock bulkheads covering the upper intertidal zone. The proposed bulkhead will not result in "coarsening" of this beach. Because of the setting (vertical concrete bulkheads on either side), it will remain a "pocket beach" that continues to collect sand.

Report, April 8, 2008, Mark G. Pedersen (former WDFW employee), Kitsap County Hearing Examiner, Case No. 07-45866.

Many of the policies for shoreline armoring are excellent, including the obligation of a proponent to prepare a site-specific analysis. For some sites with high wave energy and long

fetches, the existing literature demonstrates that “soft bank” facilities or techniques are not feasible, as Mr. Pederson found:

Regarding the alternatives to bank erosion control, I offer the following comments:

I have reviewed a number of documents on the subject, including an Ecology publication: Alternative Bank Protection Methods for Puget Sound Shorelines (Zelo, et al., 2000). It presents several case histories of erosion control for sites of various shoreline types and habitat conditions. In some examples in this publication, depending on site conditions (generally high energy, steep slopes), rock bulkheads, placement of large rocks on the beach, revetments, and quarry spalls were chosen for use on the sites.

I have looked at the literature and made an investigation as to the success of soft bank protection methods on locations similar to those of the proponent in this appeal. One of the experts in the field is Jim Johansson with Coastal Geologic Services in Bellingham. He does mostly soft bank types of protection, mainly beach nourishment on lower profile, low energy beaches. He did one high bluff project near Semiahmoo in Whatcom County in 2002. It was a cobble and anchor log control approach. While it protected the toe, it had to be repaired at least a few times in the last five years.

In terms of soft protection proposals involving beach nourishment, these have impacts on the beach. In order to construct a berm, the beach profile is changed. There is disturbance of the beach that can result in turbidity and there is covering of the existing organisms in the intertidal. While these are temporary, they are impacts.

While there has been some success at low energy sites, I don't know of any soft bank protection projects in high-energy areas that have been successful in the long term at a reasonable cost for individual homeowner projects.

Report, April 8, 2008, Mark G. Pedersen, Kitsap County Hearing Examiner, Case No. 07-45866.

The SMA requires each local master program to protect “single family residences and appurtenant structures against damage or loss due to shoreline erosion.” The provisions of any SMP “. . . shall provide for methods which achieve effective and timely protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion.”

RCW 90.58.100 (6) (emphasis added), especially structures built before 1991. Where are such provisions in the proposed draft? It appears that supportive language to protect older homes is missing.

As an exempt development, a proposed protective bulkhead must be approved if it complies with provisions in the County's Shoreline Master Program ("SMP"). RCW 98.58.140(1); see also, *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697-98, 169 P.3d 14 (2007). This is a mandatory provision. *Id.* See also *Advocates For Responsible Development v. Johannessen and Mason County*, SHB No. 05-014 at *9 (2005), citing RCW 90.58.030(3)(e)(ii) and WAC 173-27-040(2)(c). As the Supreme Court stated in the *Biggers* case:

The SMA also recognized there is an important function performed by structures that protect shorelines. The legislature's 1992 amendments to the SMA further emphasized this need for certain shoreline structures to provide for the protection of shorelines. This conclusion is illustrated by the SMA's provisions requiring prompt adoption of SMP's provisions requiring prompt adoption of SMPs and shoreline structure permit processing.

The SMA contains an express "preference" for issuing such permits. RCW 90.58.100(6). Thus, the SMA also requires that all SMPs contain methods to achieve "effective" and "timely" protection for shoreline landowners. *Id.* SMPs must provide for "the issuance of methods such as construction of bulkheads" *Id.* Permit application to local governments must be processed in a timely manner. See *id.*

* * *

The desirability of some shoreline structures is further evidenced by the requirement that SMPs include exemptions from permitting requirements for certain structures. See RCW 90.58.030(3)(e). Activities exempted from the "substantial development" permit requirement include the installation of a protective bulkhead for a single family home, maintenance and repair of existing structures, and construction that is necessary for agricultural activities. See RCW 90.58.030(3)(e)(i)-(iv).

162 Wn.2d 697-698.

According to the Draft SMP, structural shoreline armoring is permitted only to protect a lawfully established primary structure, such as a residence, that is essentially in "imminent danger" of loss or substantial damage from erosion caused by tidal action, currents, or waves. The regulatory standard in the SMA does not have such preclusive language, allowing "normal

protective bulkheads” common to single-family residences. It is not safe to wait to protect a home or property until the risk is “imminent.” The State Guidelines use the terms “significant possibility of damage” (WAC 173-26-23(3)(a)(iii)(D)) and defer to a geotechnical engineer to make the call. **Proper allowance of protective bulkheads is a matter of public safety.**

The problem, as geotechnical engineers will support, is that loss of a bank or slope is episodic. In Puget Sound or the Straits of Juan de Fuca, an existing bank can slab off in portions of more than five or ten feet. The recent slide on Whidbey Island is a case in point. Property owners should not be left in a winter storm at 3:00 a.m. wondering if the next failure event is going to happen, and the last ten or fifteen feet of the bank breaks off with their home left overhanging the bank, or, worse, sliding down to the beach or into Puget Sound or the Straits of Juan de Fuca.

Section 6.1.3, Policies (Shoreline Modification). These policies are inconsistent. On the one hand, the policies allow structural modifications, but on the other require that impacts be “avoided.” This reference to “avoided” should be eliminated to promote internal consistency.

Section 6.1.4, Regulations – Prohibited Uses. Subsection 3, which prohibits shoreline modifications “located on feeder bluffs in most instances” is overly broad. In addition, the City should specify in detail what “feeder bluffs” this section is intended to apply to. In *Stollar v. Ecology, et al.*, SHB Nos. 06-024; 06-027, the City witnesses conceded that only 11% of bluffs on the Island could be characterized as “important feeder bluffs.” Even then, the Board allowed hybrid bulkheads on these land forms.

Section 6.2, Shoreline Stabilization. Subsection 6.2.2 (Applicability) is written too broadly. To require exempt structures to comply with all applicable master program regulations is inconsistent with the SMA which allows bulkheads under exemptions intended to protect single-family homes.

The SMA explicitly allows protection of single-family residential homes as an exempt activity, including the repair of structures and the outright replacement of these structures. The demonstrated prejudice of the Draft SMP towards shoreline stabilization is totally inconsistent with the SMA, which supersedes local preferences and even the language of the State Guidelines.

My clients believe that these regulations are overly broad. So is the prohibition on removal of “significant vegetation” that adversely impacts ecological functions. The SMA allows residential protective bulkheads under its exemptions. In this regard, the SMA provides that the construction of a “normal protective bulkhead common to single family residences” is not considered a substantial development but exempt. RCW 90.58.030(3)(e)(ii). *See also*, RCW 90.58.030(e)(i) (maintenance). The City’s restrictions on residential bulkheads are inconsistent with the SMA.

The SMA requires each local master program to protect “single family residences and appurtenant structures against damage or loss due to shoreline erosion.” The provisions of any SMP “. . . shall provide for methods which achieve *effective and timely* protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion.” RCW 90.58.100 (6) (emphasis added), especially structures built before 1991.

Section 6.2.3, Policies (Shoreline Stabilization). It is respectfully requested that the City explain its reasoning for “discouraging” shoreline stabilization. Under modern regulatory systems, horror stories of the past related to shoreline stabilization are not being repeated. The State of Washington Department of Fish and Wildlife and the U.S. Army Corps of Engineers are charged to protect the environment, yet their regulations allow shoreline stabilization. For example, ACOE regulations, 33 CFR Section 320.4(g)(2) state: “Because a landowner has the general right to protect property from erosion, applications to erect protective structures will usually receive favorable consideration.”

What does the City know about bulkheads that are not known to these agencies with jurisdiction? Why is protection of eroding land discounted and not allowed unless a structure is on a parcel?

As to Subsection 3, it is impossible to design and locate all new development in a manner “that prevents the need for shoreline stabilization and armoring.”

In particular, undeveloped lots are often found between developed lots with bulkheads. In those situations, a bulkhead is necessary protection from the effects of these permitted structures, as the Shoreline Hearing Board found in a case on the Sand Spit, *Stafford v. City of Bainbridge Island*, SHB Case No. 03-010.

The language in Subsection 9, that shoreline stabilization should not be constructed waterward of feeder bluffs, is inconsistent with RCW 77.55, a general law of the State binding on the City under the WASH. CONST. ART XI, Sec. 1. This Law allows shoreline stabilization to be constructed below the OHWM in narrow circumstances. Subsection 6.2.6, Subsection 7, is likewise inconsistent with RCW 77.55 because it prohibits location of shoreline stabilization structures “landward of the OHWM.”

Subsection 6.2.6.1 is an excellent recitation and consistent with the SMA. However, there are internal inconsistencies throughout the Draft SMP as to hard structural stabilization, because there is no clear demarcation between structures in existence prior to January 1, 1992 and those built thereafter. In addition, there is a conflict with RCW 77.55, noted above.

Section 6.2.7, Regulations-Repair of Existing Structural Stabilization. The language in this section is inconsistent with and in conflict with the SMA. By determining that repairs of more than 50% constitute replacement, the work falls within Section 6.2.8, Regulations – New or Replacement Structural Stabilizations. Therein, a property owner is required to provide an

analysis which commences in order of preference with “no action / allows shoreline to retreat without intervention.” The stated priority and prohibition is in conflict with the SMA which allows protection of single-family homes.

In addition, replacement of a failing bulkhead structure is considered a “normal repair” under the SMA. In Section 1, Subsection F, there is language that at least to this reader is incomprehensible.

Section 6.3.3, Policies (Over Water Structures). The language in Subsection 8 as to new docks in Blakely Harbor, in particular Subsection B, community docks, is unenforceable. Effectively, the City mandates that residents who desire to construct a community dock at their own expense are mandated to provide a “non-extinguishable option to access the community dock” to any member of at least the community, if not the general public. This is an illegal exaction which allows access across private property for private uses.

This unconstitutional arrangement is resolved by rewriting the regulations to read as follows:

* * *

B. Policies.

1. Multiple use and expansion of existing conforming piers, docks, and floats should be encouraged over the addition and/or proliferation of new facilities. Joint use facilities are preferred over new, single use piers, docks, and floats.

* * *

9. The development of new docks and piers shall be prohibited within Blakely Harbor between Restoration Point and the most eastern point along the north shore of Blakely Harbor (sometimes referred to as “Pigott Pt.” or “Jasmine Pt.”), except that:

a. In addition to those docks existing as of the effective date of this provision, a total of five new²¹ neighborhood or joint use docks shall be permitted with no more than two along the north shore and three along the south shore of Blakely Harbor; and

b. One small public dock and/or pier for the mooring of dinghies and loading or unloading of vessels shall be allowed for daytime use.

²¹ This number is consistent with deposition testimony of City officials which show five sites have the physical characteristics to support joint use docks. The shoreline owners are open to discuss the suggested number of community docks.

* * *

C. Regulations – General.

1. Piers and docks shall be a permitted use in the rural, semi-rural, urban and aquatic environments, shall be a conditional use in the conservancy environment, and shall be prohibited in the natural and aquatic conservancy environments. The development of new docks and piers shall also be prohibited within all shoreline designations within Blakely Harbor between Restoration Point and the most eastern point along the north shore of Blakely Harbor (sometimes referred to as “Pigott Pt.” or “Jasmine Pt.”), except that:

a. In addition to those docks existing as of the effective date of this provision, a total of five new neighborhood or joint use docks shall be permitted with no more than two along the north shore and three along the south shore of Blakely Harbor;

b. One public dock and/or pier for the mooring of dinghies and loading or unloading of vessels shall be a conditional use within the urban, semi-rural, rural, and aquatic environments for daytime use; and

c. Such joint use and public docks shall comply with this master program and other applicable laws; shall be the minimum size necessary; and shall be sited and designed to mitigate adverse impacts to navigation, views, scenic character, and natural resources as much as possible. Such joint use and public docks shall also be reasonably passable to swimmers, beach walkers, and human-powered watercraft.

* * *

G. Regulations – Residential.

5. Community or joint use docks and piers shall include no more than one moorage space per dwelling unit or lot to be served by the moorage facility.

There is undue bias against private or joint-use docks. This approach is not consistent with the SMA. The courts have ruled that private facilities which provide access for private individuals meet SMA priorities for public access to the waters of the state, since private property owners “are part of the public.” *See Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 589-90, 870 P.2d 987 (1994). The Shoreline Hearings Board noted in a case involving approval of construction of a dock on Bainbridge Island that:

Here we are concerned with the building of docks, a generally favored type of shoreline development, and the impact of allowing this on public access, another priority item. Of course, these private docks in a limited way improve access – the Hammer dock in particular, since it is to be a joint use facility [shared by two property owners].

The Supreme Court long ago declared the construction of private docks under the SMA to be a beneficial public use of the state's shorelines:

[O]ne of the many beneficial uses of public tidelands and shorelands abutting private homes is the placement of private docks on such lands so homeowners and their guests may obtain recreational access to navigable waters. No expression of public policy has been directed to our attention which would encourage water uses originating on public docks, as they do, while at the same time discouraging any private investment in docks to help promote the use of public waters.

Caminiti v. Boyle, 107 Wn.2d 662, at 673-74, 732 P.2d 689 (1987) (emphasis added).²²

The balance envisioned by the SMA anticipates that there will be some impact to shoreline areas by development, because alterations of the natural conditions of the shorelines must be recognized by Ecology. RCW 90.58.020. *See, Biggers*, P.3d at 22 (“The SMA embodies a legislatively determined and voter-approved balance between protection of the state shorelines and development As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as **single-family residences, bulkheads, and docks.**”) (Emphasis supplied).

More balance is in order. Private and public docks provide significant access to the waters of this state for the public. Boat launches, docks, piers, floats, marinas and mooring buoys all encourage recreational use and access. It is acknowledged that there will be some impacts with construction and use of these facilities, but under modern regulatory requirements, these are minimal and easily mitigated. *See Pentech Study, Exhibit 11* hereto. But the SMA, as set out above, encourages alterations to the shoreline for priority uses, which include recreational use and access.

²² The DOE Guidelines similarly recognize docks and piers associated with a single-family home as water dependent preferred uses: “as used here, a dock associated with a single-family residence is a water dependent use provided that it is designed and intended as a facility for access of watercraft and otherwise complies with the provisions of this section.” WAC 173-26-231(b).

Section 6.3.4, Regulations – Prohibited (Over Water Structures). What is the factual or scientific basis to support a ban on new docks and piers within Murden Cove? In addition, the language of Subsection 3 is confusing (and potentially inconsistent) in that Subsection 3.3.3 (Policies) allows development of two community docks in Blakely Harbor.

Section 6.3.7.2, Pier Regulations. The statements in this section are not appropriate. They appear to be the personal preference and views of the drafters and misstate the literature and science. In addition, consideration must be given to the effect of modern regulations. Again, the State of Washington Department of Fish and Wildlife and the U.S. Army Corps of Engineers routinely approve residential docks of a certain design in Puget Sound. In the past, the Army Corps of Engineers approved these structures by inclusion in a regional general permit based upon the absence of any overriding impact to the aquatic environment, if standard design procedures are utilized. Prejudice against these small piers or docks is supported by site-specific studies on Bainbridge Island. *See* Exhibit 11 (Pentech Study).

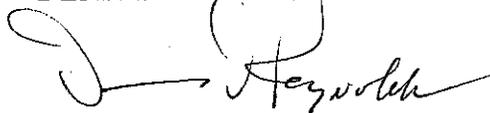
Section 6.3.7.4, Regulations – Community and Joint Use Piers and Docks. For the reasons stated above, the language in Subsection 3 is unenforceable.

Section 7.0, Definitions. The definition of “adverse impact” should include the concept of no net loss and modify the terms “causing a moderate degree of greater harm” only if impacts are “unmitigated.” The requirement of the SMP to mitigate measurable impacts obviates the need to worry about adverse impacts. The definition of “critical areas” seems acceptable, but explanation is required for the public to understand what is considered Fish and Wildlife Conservation Areas and “critical habitat” for purposes of shoreline regulation. The definition of “cumulative effects” is too broad. The concept of no net loss is not appropriately applied to individual shoreline development and/or use. The definition of “nonconforming development” is inconsistent with the internal provisions of the Draft SMP, which only consider development nonconforming if it does not comply with the provisions of the 1996 Shoreline Master Program. In addition, the term is inconsistent with the provisions of the Draft SMP which do not apply new buffers, setbacks, and vegetation setback requirements to the built environment. As for the term “Priority Habitat,” what does the City consider such habitat to be? The public needs to understand what areas have been classified or mapped as Priority Habitat in order to properly comment on the provisions of the Draft SMP.

Thank you for your kind attention to these comments and the attachments.

Very truly yours,

DENNIS D. REYNOLDS LAW OFFICE



Dennis D. Reynolds

Council Members
City of Bainbridge Island
April 9, 2013
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Attachments

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DDR/cr

EXHIBITS LIST

- Exhibit 1** Kim McCormick letter of January 31, 2013 provided to the Bainbridge Shoreline Homeowners.
- Exhibit 2** Resume of Dr. Donald F. Flora
- Exhibit 3** Dr. Flora's analysis ("A Perspective on Shoreline Policy, Technical Issues, Some Studies at Hand, and The Research Void," July 2009, April 2010)
- Exhibit 4** Dr. Flora follow-up analysis on absence of documented cause and effect ("Shore Protection and Nearshore Habitats, Recent Puget Sound Research," August 2010)
- Exhibit 5** Dr. Flora follow-up analysis on absence of documented cause and effect ("Evidence of Near-Zero Habitat Harm from Nearshore Development," November 2009)
- Exhibit 6** Dr. Flora follow-up analysis on absence of documented cause and effect ("Evident on Impact-Neutral Bulkheads, Floats, and Other Shoreline Modifications," December 2009)
- Exhibit 7** Dr. Flora follow-up analysis on absence of documented cause and effect ("Evidence on Habitat-Neutral Bulkheads, Floats, and Other Installed 'Stressors'," February 2010)
- Exhibit 8** CLE materials: "MITIGATION vs. RESTORATION, Testing the legal limits," Perkins Coie LLP (Alexander Mackie), 2011
- Exhibit 9** "THE SHORELINE MANAGEMENT ACT AND PUBLIC ACCESS, a Critique of Common Practices and Limitations on 'Furthering Substantial Governmental Purpose' When Considering Public Access Requirements for Washington State Shorelines under the Shoreline Management Act," Alexander Mackie, Perkins Coie LLP, March 25, 2011
- Exhibit 10** Sutherland comment letter
- Exhibit 11** Pentech study ("Best Available Science Review of Proposed Overwater Structure Restrictions in Blakely Harbor, Bainbridge Island, Washington," October 24, 2006)